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No. 88-6025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

REUBEN DOWLING

Petitioner,

v.

UNITED STATES

Respondent.

BRIEF OF PETITIONER

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QUESTION PRESENTED

1. Does the due process clause of the Fifth Amendment bar evidence against a defendant in a criminal case of unrelated criminal conduct, introduced pursuant to Federal Rule of Evidence 404(b), where the defendant has previously been tried and acquitted of such offense?

2. Was the admission of evidence of unrelated criminal conduct against the defendant in this case barred by collateral estoppel principles embodied in the double jeopardy clause of the Fifth Amendment where the defendant had previously been tried and acquitted for such offense?

3. Assuming the introduction of the evidence in this case was in violation of either the due process or double jeopardy clauses of the Fifth Amendment, was the error harmless within the meaning of *Chapman* v. *California*, 386 U.S. 18 (1967).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported as *United States* v. *Dowling*, 855 F.2d 114 (3d Cir. 1988) (J.A. 31-49). A Petition for Rehearing was denied on September 28, 1988 and is unreported. (J.A. 50).

JURISDICTION

The jurisdiction of this Court arises under Title 28, United States Code, Section 1254(1). The petition for a writ of certiorari was granted on February 27, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fifth Amendment to the United States Constitution provides in relevant part that:

> [No person shall] be deprived of life, liberty, or property, without due process of law;

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, provides in relevant part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

18 U.S.C. 2111, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 52(a), Federal Rule of Criminal Procedure, provides:

> Rule 52. Harmless Error and Plain Error:

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

A. Proceedings In The District Court.

At approximately 2:15 P.M. on July 8, 1985 a lone gunman entered the First Pennsylvania Bank in Frederiksted on the island of St. Croix in the U.S. Virgin Islands. (Tr. 9-22: 92,95).[1] Wearing a dark woven mask with holes cut out around the eyes and carrying a black small caliber gun, the gunman, after ordering no one to move, jumped a counter and went from teller to teller demanding the cash drawers be emptied. (Tr. 9-22: 95,98,100-103,118-119,124,159). Placing the money in a small brown paper bag, the robber exited the bank through a side door. (Tr. 9-22:108,124,159). Approximately $7,800 was taken in the robbery. (Tr. 9-22: 156-157).

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[1] The original transcript filed with the Court of Appeals in this case consisted of five volumes. These volumes are not labelled sequentially but by the date of the proceedings contained therein. Thus, references to the volume dated 9-21-87 are abbreviated (Tr. 9-21:____); volume dated 9-22-87 (Tr. 9-22:____); volume dated 9-23-87 and 9-24-87 (Tr. 9-23 & 24:____); second volume dated 9-23-87 and 9-24-87, containing closing instructions (Inst. ____); volume dated 9-23-87 (Tr. 9-23:____). This latter volume contains only the transcript of petitioner's testimony and of the closing argument. These parts of the transcript were not originally forwarded to the Court of Appeals. They were transcribed later at that court's request and placed in the same volume. When the original joint appendix was prepared in this case counsel was not in possession of this latter volume. The parts of this volume considered most appropriate for inclusion in the appendix have been attached hereto in the form of a supplemental appendix and are abbreviated when referenced, as (Supp. App. ____).

On August 22, 1985 two Informations[2] were filed in the District Court of the Virgin Islands charging petitioner with various offenses stemming from the robbery of the First Pennsylvania Bank. (J.A. 1).[3] Petitioner's first trial on the consolidated Informations was held in November 1985. A mistrial was declared after the jury was unable to reach a verdict. (J.A. 1). Petitioner's retrial commenced on March 31, 1986. On April 2, 1986 a jury found petitioner guilty of various offenses arising out of the robbery of the First Pennsylvania Bank. (J.A. 1). The United States Court of Appeals for the Third Circuit subsequently reversed the conviction after finding that petitioner's trial jury had been improperly exposed to prejudicial extra-judicial information. *Government of the Virgin Islands* v. *Dowling*, 814 F.2d 134 (1987). Petitioner's third trial commenced on September 22, 1987. A jury again returned a verdict finding petitioner guilty of several offenses relating to the bank robbery. (J.A. 2). Petitioner was sentenced to a total of seventy years incarceration on all counts. (J.A. 12-14).

The Government relied on both eyewitness and circumstantial evidence to establish that petitioner was the

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[2] Violations of local law may be prosecuted in the District Court of the Virgin Islands by Information, except where local law requires otherwise. 48 U.S.C. Section 1561 (1987); 1 V.I.C., Revised Organic Act of 1954, Section 3 (Supp. 1988).

[3] In Information No. 85-70 the United States charged petitioner with the robbery of a federally insured bank in violation of Title 18 U.S.C. Section 2113(a) and in count two with commission of the same robbery with a gun in violation of subsection (d) of Section 2113. In Information No. 85-71 the Government of the Virgin Islands charged petitioner with armed robbery and various assault and firearms offenses resulting from the robbery of the First Pennsylvania Bank, as well as unlawful possession of stolen property in connection with the theft of a taxi van used to escape the scene. App. 3-11.

masked gunman who entered the First Pennsylvania Bank. While able to provide a general description of the robber in terms of dress and build,[4] none of the five bank employees called by the Government was able to identify the petitioner.[5]

The only identification testimony provided by someone in the bank at the time of the robbery was that given by Antonio Messer, who was standing in line waiting to see a teller when the robber entered the bank. (Tr. 9-22:187). While the robbery was still in progress Messer exited the bank. (Tr. 9-22:188,221-222). Messer proceeded across the street to his car. Unable to find his keys, he took cover behind a pillar in front of a nearby building. (Tr. 9-22:189-190). From this location he was able to see the robber running around outside in the street in front of the bank. (Tr. 9-22:190). Messer observed the robber, gun in hand, running towards a taxi van that was slowing moving down the street. The robber struggled with the driver and then commandeered the van with the driver exiting the vehicle. (Tr. 9-22:190-193,223). The van, with the robber now driving, slowly proceeded in the direction of Messer. While the van was leaving, Messer saw the robber begin removing his mask from his face. (Tr. 9-22:193). Based on the three to four seconds he had to view the

[4] Various witnesses described the robber as tall (Tr. 9-22:97,152), muscular or well-built (Tr. 9-22:98,120,152), and wearing a green army shirt (Tr. 9-22: 98,120,147), jeans or dark pants (Tr. 9-22:111,120), white sneakers (Tr. 9-22: 111,157) and the mask referenced above.

[5] The five employees called by the Government were Irma Williams (Tr. 9-22:92-116), Isabel Sanes Abino (Tr. 9-22:117-122), Judith Austin (Tr. 9-22:122-126), Gladys Moorehead (Tr. 9-22:115), and Ana Santiago (Tr. 9-22: 151-157).

robber as the mask was being removed in the passing vehicle, Messer identified petitioner. (Tr. 9-22:198,224).[6]

After the van passed the pillars, Messer, suddenly able to find his keys, jumped in his car and took off in pursuit. Losing sight of the van, Messer asked an individual on the street the direction taken by the vehicle. Proceeding to search in the general area directed, Messer saw the van parked on the side of the road. Messer then returned to the bank, informing the police where he had seen the parked van. (Tr. 9-22:196).

While Messer was the only witness inside the bank at the time of the robbery able to identify petitioner, the Government did offer two other witnesses who identified petitioner as the individual driving the commandeered taxi van shortly after the robbery. Hayde Pichardo and her then seventeen year old daughter, Amado Rosario, lived in the Smithfield section of St. Croix just outside Frederiksted. (Tr. 9-22:242). On the afternoon of July 8th, shortly after the bank robbery, Pichardo and Rosario were in their home when they heard a loud noise. Looking through open window louvers they observed a taxi van

[6] Messer's testimony concerning the robber's actions outside the bank was corroborated by Vernon Fabio and Maurice Hamilton. Fabio, who also had been in the bank at the time of the robbery, hid behind a pillar outside and observed the robber commandeer the taxi van. Fabio also saw the robber removing the mask (from his chin to the forehead area) as he slowly drove past the pillar area where Fabio, and apparently Messer, were standing. (Tr. 9-22:158-161,165-167). Hamilton, the driver of the taxi van, related how a masked man with a gun approached his slowly moving van and pulled him from the driver's seat. (Tr. 9-22:173-174). Neither Fabio nor Hamilton were able to identify petitioner.

approaching the front yard at a high rate of speed.[7] Pichardo, upset because of the reckless manner in which the vehicle was being driven, hollered at the driver from inside her house, calling him a "son of a bitch." In response the driver stuck his head out the window of the van. (9-22:242;9-23&24:4-5). Both Pichardo and Rosario identified the same taxi van as that previously identified as having been commandeered in front of the bank. Both also identified petitioner as the driver of that vehicle. (Tr. 9-22:245-246;9-23&24:16).

The identification testimony of Messer, Pichardo, and Rosario was vigorously contested by the petitioner. This attack was based primarily on the limited amount of time available for the observations, the limited view, the stressful circumstances existing at the time, and the fact that each of these witnesses had failed to identify the petitioner during one or more pretrial identification procedures. See generally (Tr. 9-22: 218-35 (Messer); 257-75 (Pichardo); Tr. 9-23: 16-33 (Rosario)).

Unable to produce any physical evidence[8] and faced with somewhat less than compelling identification evidence[9] the Government sought to connect petitioner to

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[7] Pichardo and Rosario testified almost identically concerning the circumstances surrounding their observations that afternoon. Conspicuously they also gave almost identical testimony relating to their reason for failing to make a pretrial identification of the petitioner at a lineup. (Tr. 9-22: 254-56, 265-69 (Pichardo); Tr. 9-23 & 24: 13-15, 25-30 (Rosario)).

[8] Neither the gun nor mask used or the money taken by the robber were apparently recovered.

[9] The Government attempted to bolster the identification evidence by showing that petitioner was approximately the same height and build as the masked gunman. Witnesses in the bank had described the robber as "tall" (Tr. 9-22:97,152) with estimates of approximately

the robbery of the First Pennsylvania Bank by utilizing Federal Rule of Evidence 404(b) which allows evidence of "other crimes, wrongs, or acts" where relevant to prove, among other things, identity. Thus, the Government sought to show that approximately two weeks after the bank robbery petitioner had gone to the home of Ms. Vena Henry with a mask and gun in order to commit robbery. Petitioner had previously been tried in connection with the Henry robbery and acquitted. See generally (J.A. 15-28).

In order to set the stage for the Henry testimony the Government called Phillip Tutein and police officer Anita Christian. Tutein, a friend of petitioner, testified that he had lent petitioner his white Volkswagon on either July 7th or July 8th. (Tr. 9-23&24:37-39).[10] The Government sought to tie both the white Volkswagon and Vena Henry evidence to the bank robbery through the testimony of officer Anita Christian. Officer Christian was patrolling in the town of Frederiksted during the afternoon of July 8th. At approximately 2:15 to 2:30 P.M. she and her partner observed a white Volkswagon parked on the side of the street. (Tr. 9-23&24:52-53).[11] Noticing the door of the

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6'1" (Fabio) to 6'2" (Williams). An FBI agent testified that he was able to conclude from an examination of the bank surveillance cameras that the robber was at least 72 inches tall. (Tr. 9-23&24:107-108). The probative value of this evidence, while limited, was further attenuated by numerous qualifications and assumptions. (Tr. 9-23&24:101-109).

[10] Tutein initially testified that he had lent petitioner the car during the "summer" of 1985, but could not recall the date. However, Tutein admitted he had told police officer Zurita on July 9th that he had lent the white Volkswagon to petitioner a "day or two" prior to that date. (Tr. 9-23&24:39).

[11] The record does not reveal the distance from the area where the car was parked to the First Pennsylvania Bank.

Volkswagon was open in the direction of the traffic the officers stopped and requested the occupants to close the door. A "clear" skinned person was in the driver's seat and Officer Christian's cousin, Delroy Christian, was in the back seat. (Tr. 9-23&24:53-54). After Delroy and Officer Christian exchanged waves, the Volkswagon slowly pulled off heading north out of town. The police officers followed for approximately a mile and then turned around. While heading back into town the officers received a radio transmission alerting them to the robbery at the First Pennsylvania Bank. (Tr. 9-23&24:53-54,56).

The Tutein-Anita Christian evidence was offered by the Government for two purposes. First, relying on evidence that upon leaving the bank the robber ran around as if looking for someone (Tr. 9-22:92,125,190) and the argument that a robber who had taken pains to wear a mask and gloves was unlikely to leave his getaway unplanned (Tr. 9-23:29), the Government's theory was that the individuals in the white Volkswagon, allegedly the Tutein vehicle, were driving the getaway car, but that the plans had been stymied by the officers' sighting them in the vicinity. According to the Government's theory, the sudden, unplanned departure of his accomplices having left him with no means of escape, the robber had to forcibly appropriate the taxi van.[12] Second, the evidence connecting the petitioner to the Tutein vehicle and thereby to Delroy Christian was offered in an attempt to bolster the relevance of the Vena Henry testimony.

Prior to trial the Government moved the court *in limine* for a ruling allowing Ms. Henry to testify that approximately two weeks after the First Pennsylvania robbery, a

[12] App. 17-21.

masked intruder, in the company of Delroy Christian, entered her home. According to Ms. Henry the intruder was wearing a mask with holes cut out for the eyes and was carrying a small handgun. While in the house a scuffle ensued and Ms. Henry, a lady "at that time at least in her fifties" (A. 18) pulled the mask off the intruder, thereby recognizing petitioner. (A. 17-18).[13] The Government had not attempted to introduce this evidence at either of petitioner's first two trials. (A. 16). Citing Federal Rule of Evidence 404(b) and relying on the use of a mask with holes cut out for the eyes[14] and a small handgun in both robberies, the Government argued the evidence should be admitted on the issue of identity. (A. 18-21). Defense counsel pointed out that the petitioner had been previously tried for the Henry robbery and acquitted and for that reason alone the evidence should be excluded. Defense counsel further argued that the Government had failed to show sufficient unique similarities between the

[13] The facts as stated are those proferred to the court by the government in argument on the motion to admit the evidence. (App. 18-19). In its opening statement the government mentioned these same facts, including a reference to the fact that petitioner had been acquitted in connection with the Henry robbery. (Tr. 9-22:64-65). During her testimony in front of the jury Ms. Henry made reference to the mask, gun, and the fact that she "raised" the mask from the intruder's face, without specifically referring to the details of the "struggle" or the robbery. (App. 38-41). However, the jury was undoubtedly knew that a robbery had allegedly taken place at the Henry home, given the circumstances related in the Henry testimony, and the specific references to the Henry robbery in the opening statement of the Government (Tr. 9-22:64-5), closing argument of defense (Tr. 9-23, 67), and in the instructions of the court. (App. 29).

[14] The Government conceded that the same mask was not used in the Henry and First Pennsylvania robberies, as they were different colors. (App. 19, 27-8).

Henry and First Pennsylvania robberies to justify admission on the issue of identity under Rule 404(b). (App. 21-23). The district court found the Henry evidence "more probative than prejudicial" and that any prejudice could be minimized "by pointing out to the jury that in that later instance [the Henry robbery] Mr. Dowling was not convicted, in fact was acquitted of the incident." (App. 25). The district court did so inform the jury both at the time of Ms. Henry's testimony (App. 28) and in the general instructions at the conclusion of the case. (App. 29).

B. The Decision Of The Court Of Appeals.

On appeal to the United States Court of Appeals For the Third Circuit petitioner argued that the admission of the Henry evidence was error entitling him to a new trial. The Third Circuit agreed with petitioner that the evidence was erroneously admitted, relying on prior circuit precedent as announced in *United States* v. *Keller*, 624 F.2d 1154 (1980). While recognizing the "constitutional doctrine of collateral estoppel" and that language in *Keller* could be read as endorsing the constitutional underpinnings of collateral estoppel as applied in criminal cases, the court, without further elaboration or clarification, held that the admission of the evidence was error in light of the common law collateral estoppel principles of *Keller*, without reaching the constitutional issue. *United States* v. *Dowling*, 855 F.2d 114 (1988) (App. 31-49).[15]

[15] As an alternative ground, the Third Circuit held that the Henry evidence should not have been admitted through a straight application of the probative-prejudice balancing test required by Federal Rule of Evidence 403. The court noted the "limited similarity" between the bank robbery and Henry incidents and that the acquittal in the latter weighed heavily in favor of exclusion under this analysis. (App. 44-45). In its response to the petition for writ of certiorari, p. 11, n. 5, the government contends the Third Circuit's alternative ruling on this ground was also erroneous. While agreeing with the Third Circuit's analysis, petitioner submits that it is not necessary for the Court to reach that issue, as it is agreed that if the evidence was inadmissible through a straight-forward application of the provisions of Rule 403, and not in violation of the Constitution, the Third Circuit employed the proper harmless error analysis.

The court then considered the issue as to whether the admission of the Henry evidence was harmless error. Stating that it need not "be convinced that the error was harmless beyond a reasonable doubt," as the error did not affect a constitutional right, the court then applied its "high probability" standard of harmless error review. *Id.* at 123. (App. 46). This standard required that the court have a "sure conviction that the error did not prejudice the defendant but need not disprove every reasonable possibility of prejudice." *Id.* The court then proceeded to review the evidence and, while not "entirely discount[ing]" the prejudice to petitioner, ruled that the high probability standard had been met and that a new trial was not required. *Id.* at 124.

Petitioner filed a timely petition to rehear and suggestion for rehearing en banc, contending that the court had applied the wrong standard of harmless error review. Petitioner argued that the erroneous admission of the Henry evidence was a violation of the due process and/or double jeopardy clauses of the Fifth Amendment and that consequently this court's decision in *Chapman* v. *California*, 386 U.S. 18 (1967) required that the reviewing court be convinced beyond a reasonable doubt that the error did not affect the proceedings before disregarding the same. The petition to rehear and suggestion for rehearing en banc was denied without opinion. (App. 50).

The petition for writ of certiorari filed on behalf of the petitioner was granted by this Court on February 27, 1989.

SUMMARY OF ARGUMENT

The threshold issue presented is whether the admission of the evidence concerning the Henry robbery constituted double jeopardy or deprived the petitioner of his right to due process within the meaning of the Fifth Amendment of the United States Constitution. If so, a further issue is presented as to whether the admission of such evidence was harmless beyond a reasonable doubt under the facts of this case.

In *Ashe* v. *Swenson*, 397 U.S. 436 (1970) this Court held that collateral estoppel was an "established rule of federal law [and] is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.* at 445. The defendant Ashe was accused of robbing six participants in a poker game. Ashe was initially tried for the robbery of only one of the poker players. His defense was that he was not the robber. He was acquitted. The State of Missouri then tried him for the robbery of a second participant in the poker game. After being found guilty, Ashe petitioned for a writ of habeas corpus. This Court held that after his acquittal in the first trial the double jeopardy clause of the Fifth Amendment[16] barred the State of Missouri from further prosecution of Ashe in connection with the robbery of any of the remaining poker players. Since identity had been the issue implicitly determined in the first trial Ashe could not be forced to again defend against the allegation that he was the individual who robbed the poker game

[16] *Benton* v. *Maryland*, 395 U.S. 784 (1969) held the double jeopardy provision of the Fifth Amendment applicable to the states.

even though his trial for allegedly robbing the second poker player would be for a distinct crime.

The fundamental double jeopardy issue presented in this case is whether the preclusive principles of *Ashe* apply when the Government seeks to introduce evidence of other crimes pursuant to Federal Rule of Evidence 404(b) and the defendant has previously been acquitted of such conduct. In these situations the acquittal did not determine an "ultimate" fact or a necessary element of the new offense, as the situation presented in *Ashe*.[17] The acquitted conduct merely involves "evidentiary" facts which the Government seeks to prove in a subsequent prosecution.

The issue as to whether evidence concerning acquitted conduct may be adduced in a subsequent prosecution has divided the circuit courts of appeal. Several circuits exclude such evidence on constitutional grounds. See cases cited in Section I-B of the Argument. These decisions usually rely on the double jeopardy clause, holding the principles of *Ashe* equally applicable to the proof of evidentiary facts involving acquitted conduct, though the opinions often have a distinct due process overtone. For instance see *United States* v. *Mespoulede*, 597 F.2d 329, 330 (2nd Cir. 1979) ("constitutionally rooted considerations of fairness."); *Wingate* v. *Wainwright*, 464 F.2d 209, 215 (5th Cir. 1972) ("fundamentally unfair . . . and incongruous with our basic concepts of justice."). Other circuits take the approach, such as that followed by the Third Circuit in this case, that such evidence is excluded through application of common law collateral estoppel principles without deciding the constitutional issue. Argument, Section I-B, *infra*. Still other decisions admit

[17] See footnote 29 *infra*.

the evidence without discussion of the collateral estoppel issues if the evidence is otherwise admissible under F.R.E. 404(b). Argument, Section I-B, *infra*. Though the majority admit prior acquitted conduct evidence the state courts have also been divided in their approach. See generally Annotation, *Admissibility of Evidence As To Other Offense As Affected By Defendant's Acquittal of That Offense*, 25 A.L.R. 4th 934.

Petitioner initially argues that the due process clause of the Fifth Amendment bars the prosecution from introducing evidence of other offenses for which the defendant has previously been acquitted, regardless of the basis of the acquittal. While the Government, in its response to the petition for the writ of certiorari, p.14, n. 8, dismisses the due process argument as being contrary to *Hoag* v. *Jersey*, 356 U.S. 464 (1958), the petitioner respectfully suggests otherwise. The primary due process question presented in *Hoag* was whether this provision of the constitution mandated joinder in a single trial of separate offenses arising out of the same transaction.[18] This is clearly distinguishable from the due process question presented in this case.

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[18] In its statement suggesting the inapplicability of *Hoag*, the Government makes reference in that decision to the statement expressing "grave doubts whether the collateral estoppel can be regarded as a constitutional requirement," *Id.* at 471, a view subsequently repudiated in *Ashe* v. *Swenson*. A second due process question presented in *Hoag* was whether collateral estoppel was a component of due process. Since *Ashe* later held collateral estoppel to be within the ambit of double jeopardy protection, the ruling in *Hoag* in this regard is immaterial. Petitioner's due process argument does not depend on any collateral estoppel analysis. Indeed, as discussed below petitioner contends that basic fairness requires the exclusion of such evidence on due process grounds without an attempt to wade the often murky waters of collateral estoppel analysis.

The exclusion of such evidence is consistent with several goals of the criminal justice system some of which have been given explicit due process protection. The prior acquittal at a minimum raises questions as to the reliability of such evidence. The risk that an innocent defendant may suffer serious adverse consequences is also unacceptably increased when he is called upon to again defend. Further, if the second jury draws the inference the Government requests, the admission of such evidence constitutes a judicial invitation to undesirable inconsistency, a consideration not present in the necessarily tolerated single-trial inconsistent verdict cases. Such a procedure only undermines the important public interest in the reliability of the adjudicatory process.

The admission of acquittal evidence is also inconsistent with commonly accepted notions of fair play and contrary to a "principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). That tradition is that a person tried and acquitted of a crime should not again be forced to defend that accusation in a subsequent criminal proceeding. The resource advantage possessed by the government in a normal case is unconscionably compounded when a defendant is again forced to defend. Finally, while not determinative, petitioner contends that a due process rule has the advantage of easy application, freeing the courts from the difficult and at best speculative, at worst result—oriented, process of attempting to determine, with little concrete evidence, the often indecipherable motivation behind the unitary judgment of a collective body of twelve who perhaps reached the same result applying different reasoning.

In a second argument petitioner contends that if prior acquittal evidence is not barred across-the-board on due

process grounds, then in this case the Vena Henry evidence was admitted in violation of the collateral estoppel —double jeopardy principles of *Ashe* v. *Swenson*, *supra*. This argument requires the Court to answer the threshold inquiry as to whether the principles of *Ashe* apply to the situation where the Government is not reprosecuting for a separate offense arising out of the same factual scenario but is attempting to introduce evidence of acquitted conduct at a subsequent trial. Petitioner suggests that the numerous cases holding that there is no reasoned distinction between the two situations are correctly decided. Traditional double jeopardy—collateral estoppel principles such as the protection of litigants from the burdens of relitigation, the particular double jeopardy interest in sparing a criminal defendant the concerns and burdens of being forced to undergo a second trial for acquitted conduct, and the interest in judicial economy all support the argument that *Ashe* equally applies in cases such as that presented here.

Finally, in applying the collateral estoppel analysis to attempt to determine the basis of the acquittal in the Henry case, petitioner suggests that although the record is not clear, in that it does not contain a transcript of the prior trial, nonetheless the purported explanation for that acquittal offered by the Government Flies in the face of *Ashe's* admonition against "hypertechnical" approaches in the attempt to reconstruct the basis of the prior verdict, and runs afoul of *Ashe's* injunction that such determinations be made with "realism and rationality." *Id.* at 444.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BARS EVIDENCE OF UNRELATED CRIMINAL CONDUCT, INTRODUCED PURSUANT TO FEDERAL RULE OF EVIDENCE 404(B), WHERE THE DEFENDANT HAS PREVIOUSLY BEEN TRIED FOR SUCH CONDUCT AND ACQUITTED

While the decisions of the circuit courts of appeal excluding evidence of acquitted conduct normally rely on the double jeopardy-collateral estoppel principles announced in *Ashe*, the decisions often are couched in terms of fundamental fairness required by the due process clause. Thus, in deciding that such evidence must be excluded in *United States* v. *Mespoulede*, 597 F.2d 329,334 (2nd Cir. 1979) the court noted that "we are guided not only by precedents bearing on the technical question this case raises, but, in addition, by fundamental considerations of fair play." In *Wingate* v. *Wainwright*, 464 F.2d 209 (1972) the Fifth Circuit voiced similar considerations:

> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime. *Id.* at 215.

Several state cases have excluded such evidence on due process grounds. See *State* v. *Wakefield*, 278 N.W. 2d 307 (Minn. 1979); *State* v. *Little*, 350 P.2d 756 (Ariz. 1960); *State* v. *Perkins*, 349 So.2d 161 (Fla. 1977).[19] In *Wakefield*

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[19] In *Perkins* the defendant's double jeopardy/collateral estoppel claim was expressly rejected because of the lack of identity of issues.

the Supreme Court of Minnesota stated the matter thusly:

> We can find no justification for requiring a defendant to bear these burdens when, as here, he has been tried and acquitted of the other charge. It is true, of course, that an acquittal does not signify 'innocent'; it means instead 'not found guilty beyond a reasonable doubt' . . . even so, it is a basic tenet of our jurisprudence that once the state has mustered its evidence against a defendant and failed, the matter is done. In the eyes of the law the acquitted defendant is to be treated as innocent and in the interest of fairness and finality made no more to answer for his alleged crime. It is our view that the admission into trial of evidence of crimes of which the defendant has been acquitted prejudices and burdens the defendant in contravention of this basic principle and is fundamentally unfair. Therefore, we conclude that under no circumstances is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense.

Exclusion of evidence of acquitted conduct on due process grounds fosters several purposes of the criminal justice system and is consistent with prior decisions of this Court.

First, the evidentiary use of acquitted conduct raises serious questions as to the reliability of such evidence. In *Loper* v. *Beto*, 405 U.S. 473 (1972) it was held a violation of due process to utilize a counselless conviction for purposes of impeachment. The absence of counsel went to "the very integrity of the fact-finding process", and accordingly such conviction was too unreliable. Similarly, because of reliability concerns this Court has held that counselless convictions may not be used at sentencing, *United States* v. *Tucker*, 404 U.S. 589 (1972) or to enhance a sentence under a recidivist statute. *Burgett* v. *Texas*,

389 U.S. 109 (1967). Indeed, as Chief Judge Kaufman noted in *United States* v. *Mespoulede*, 597 F.2d 329, 335, n. 9, in light of the principles of *Loper*, "it would be quite anomalous to permit the Government to argue guilt by proving to the jury that the defendant committed a crime of which he had already been acquitted." The defendant in *Loper* was at least convicted, in contrast to the situation here.[20] See also *Doyle* v. *Ohio*, 426 U.S. 610 (1976), where it was held that due process prohibits the cross examination of an arrestee concerning the exercise of his *Miranda* rights, in part because the reliability of drawing an inference from invocation of those rights is "insolubly ambiguous." *Id.* at 617. The drawing of an inference from evidence of other crimes for which the defendant has been acquitted is at least as "insolubly ambiguous" as is an inference from the exercise of one's *Miranda* rights.

Second, the defendant is forced for a second time to defend the allegation concerning conduct for which he has been acquitted. This creates a constitutionally unacceptable risk that the defendant will be erroneously convicted on the basis of this alleged conduct. While the defendant will not be convicted of the specific offense for which he

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[20] It might be argued that in the acquitted conduct case the Government is introducing evidence of the conduct itself and not utilizing a conviction. It is suggested that this argument is unpersuasive in light of the rationale behind the counselless conviction cases. For instance in *Tucker* it was noted that speculation as to whether the result would have been different had the defendant had counsel was "fruitless," the implication being that a lack of prejudice argument was not available to the state if for no other reason because there was no way to determine whether the defendant would still have been convicted if he had been provided counsel. 404 U.S. at 447. Here, there is no need for speculation—the defendant was acquitted of robbing Ms. Henry. The best that counsel could have done in any of the counselless conviction cases would have been an acquittal.

was acquitted he suffers the likelihood of being convicted for a separate offense based in part on inferences to be drawn from the acquitted conduct. The defendant's risk is just as great and his need to defend just as necessary. Indeed, double jeopardy jurisprudence recognizes the common-sense notion that the more times a defendant is tried the more likely it is that he will be convicted. See generally *Green* v. *United States*, 355 U.S. 184, 187 (1957). These same concerns are also protected by the due process clause. In *In Re Winship*, 397 U.S. 358 (1970) this Court held that due process requires that each element of a crime be proven by the Government beyond a reasonable doubt as this standard "is the prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. *Winship* stressed not only the "immense" and "transcending" interest of the defendant in a criminal case, but also society's interest in the reliability of jury verdicts. *Id.* Similarly, in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) this Court held that a Maine rule that shifted the burden to a defendant to prove the "heat of passion" necessary to reduce a murder to manslaughter violated due process in part because the rule tended to "increase further the likelihood of an erroneous murder conviction." *Id.* at 701.

Third, exclusion of acquitted conduct evidence furthers the desirable goal of consistency in jury verdicts. While it might be said that a conviction on the new offense is not inconsistent with an acquittal on an unrelated offense merely because evidence of the acquitted conduct was introduced in the second trial such a clinical approach ignores the fact that the conviction on the new offense may well be based in part on inferences drawn by the second jury that are inconsistent with the verdict of the first jury. While inconsistent verdicts in a *single* trial are tolerated since they could be due to mistake or lenity, *United States* v. *Powell*, 469 U.S. 57 (1984), inconsistency

is not a goal of the criminal justice system and "it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results." *United States* v. *Mespoulede*, 597 F.2d at 337.[21]

Fourth, such a rule has the advantage of easy application. Reliance on collateral estoppel principles requires the Court to engage in the often speculative process of attempting to determine the basis of the prior acquittal. Although *Ashe* counselled that the invocation of collateral estoppel should not be hindered by postulating "hypertechnical and unrealistic" grounds that might support the acquittal, *Ashe* at 444, nonetheless reconstruction of the basis of the acquittal is often speculative at best "for no one who is not present during the jury's deliberations can ever know precisely how the jury reached its verdict." *United States* v. *Mespoulede*, 597 F.2d 329, fn. 7 (2nd Cir. 1979).[22] An examination of the cases shows the often

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[21] In *Powell* Chief Justice Rehnquist explained that the rationale behind accepting inconsistent verdicts returned by a single jury in a criminal case is grounded in the recognition of the jury's unfettered discretion to return a verdict on ground of lenity or simply as a result of a mistake, and thus "it is unclear whose ox has been gored." *Id.* at 477. This consideration is not present here as there is no inconsistency in the first jury's return of an acquittal. The only inconsistency would be allowing a different jury to reach a different conclusion as to the defendant's guilt on the acquitted offense and utilize inferences therefrom to find the defendant guilty of the second offense.

[22] It is generally recognized that this difficulty may often unfairly operate to practically deprive a defendant of the benefits conferred by double-jeopardy and collateral estoppel. See generally Note: *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L. J. 962, 973 (1980); Note, *Ashe* v. *Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts*, 71 Columbia L. Rev. 321, 329 (1971); Mayers and Yarbrough, *Bis Vexari: New Trials*

difficult process of determining the basis of the prior acquittal. For instance, see *United States* v. *Salamone*, 869 F.2d 221 (3d Cir. 1989). Exclusion of such evidence on due process grounds, without an attempt to reconstruct the basis of the acquittal, is consistent with fundamental notions of fair play and at the same time avoids the pitfalls associated with the often convoluted task attempted by the courts in this area.

Finally, and perhaps most importantly, as the language cited above indicates, exclusion of evidence of acquitted conduct comports with fundamental notions of fairness. The concept that a defendant may not be convicted of an offense for which he has already been acquitted or of a new offense where evidence of the acquitted offense is relied upon is as important a component of due process as is the requirement of proof beyond a reasonable doubt or the prohibition against unconstitutional burden-shifting. A contrary rule undermines the significance of an acquittal in a criminal case.[23] The accused, although acquitted, is still subjected to the possible embarrassment and expense of an additional trial. The accused, although acquitted, is required to "suffer anew", *Burgett* v. *Texas*, 389 U.S. at 115, when forced to redefend the allegation. The accused, although acquitted, must still "live in a

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and Successive Prosecutions, 74 Harvard L. Rev. 1, 35 (1960). This problem was illustrated in *Hoag*, though the overly restrictive approach of the state court, whose determination this Court accepted there, seems to have been repudiated in *Ashe*.

[23] In *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) this Court struck down as unconstitutionally vague a state statute authorizing the jury to assess costs even where an acquittal had been returned. At least two Justices thought the statute violated due process because it attempted to impose a penalty on a defendant who had been found not guilty.

continuing state of anxiety and insecurity," *Green* v. *United States*, 355 U.S. at 187, and can never be assured that "the matter is done" *State* v. *Wakefield*, 278 N.W. 2d at 309.[24]

As discussed in the Summary of Argument, *supra*, *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), is not necessarily inconsistent with the due process result urged by petitioner, as this precise issue was not before the Court in *Hoag*. A due process issue was presented in *Hoag* concerning whether principles of collateral estoppel inhere in due process. Petitioner's due process argument does not depend on collateral estoppel analysis. Further, to the extent that *Hoag* is viewed as inconsistent with the position urged by petitioner, it is respectfully suggested that the case should be overruled, as *Ashe*, if not directly calling into question the decision in *Hoag*, certainly emasculated its reasoning. Petitioner's position is simply that due process prohibits the relitigation of such evidence without the need to attempt the often convoluted collateral estoppel analysis. See Fn. 18. Petitioner would admit that the due process bar might admit of an exception where the defendant had made an explicit admission in the prior trial of the fact concerning which the Government seeks to introduce the prior acquitted evidence. In such situations the evidence would be admissible not as

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[24] Petitioner utilizes this language in the sense of any further criminal liability being foreclosed after the acquittal. Petitioner does not contend that the acquittal should bar civil proceedings such as the forfeiture actions approved in *United States* v. *One Assortment of Eighty-Nine Firearms*, 465 U.S. 354 (1984). Obviously, the defendant's interests in such proceedings are not as paramount and many of the concerns expressed above are not as applicable when the defendant is not facing criminal consequences for conduct of which he has already been acquitted. See Section II, *infra*.

other crimes evidence or conduct for which the defendant had been acquitted, but as an admission pursuant to Federal Rule of Evidence 801(d)(2).

II. THE ADMISSION OF THE VENA HENRY EVIDENCE TO SHOW IDENTITY PURSUANT TO FEDERAL RULE OF EVIDENCE 404(B) WAS PRECLUDED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT WHERE THE DEFENDANT HAD PREVIOUSLY BEEN ACQUITTED OF ROBBING MS. HENRY.

A. The Development In This Court Of The Concepts Of Double Jeopardy And Collateral Estoppel In Criminal Cases.

The double jeopardy clause of the Fifth Amendment is a very simple statement of a general principle. The language "nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb" defines a social policy that is:

> Designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . .

Green v. *United States*, 355 U.S. 184, 187-8 (1957).

However, this language does little to answer such questions as what constitutes jeopardy, when jeopardy attaches, how a mistrial should be treated, what are the limits on government appeals, what constitutes the "same offense", what is the significance of overlapping jurisdictional boundaries etc. Thus, the contours of the double jeopardy clause remain "without a definite content until the courts or the legislatures supply definite policies." J. Sigler, DOUBLE JEOPARDY 36 (1969).[25]

[25] For a history of the origins and development of the double jeopardy concept, see Sigler, pp. 1-37. After tracing the historical evolution of double jeopardy from its Greek and Roman origins through canon law and later its common law development, the author concludes that "the historical development of double jeopardy is so complex that its genesis provides no sure indication of its meaning." Id. at 35.

Like many of the issues above, the "deceptively plain language"[26] of the double jeopardy clause gives no clear answer to the relationship of the common law doctrines of res judicata and collateral estoppel. While these later concepts were primarily developed in the civil area, the underlying rationales serve many of the same purposes of double jeopardy. The delineation of this relationship began in *Oppenheimer* v. *United States*, 242 U.S. 85 (1916), where the Court held res judicata applicable to criminal cases.[27] The original indictment had been dismissed on a statute of limitations defense. Subsequently, in a different case this Court held that the statute of limitations defense was not applicable. The Government then filed a new indictment charging the same offense. In rejecting the Government's argument that res judicata only exists in criminal cases in the "modified form of the Fifth Amendment" and that the defendant was never placed in jeopardy since a jury had not been selected, Justice Holmes wrote that "a defendant in a criminal case was surely entitled to as much protection as a debtor in a civil case." *Id.* at 87. While no reference was made to whether the result was mandated by the Fifth Amendment, the reasoning was termed "a fundamental principle of justice." *Id.*

[26] *Crist* v. *Betz*, 437 U.S. 28, 32 (1978).

[27] *Oppenheimer* is sometimes referred to as establishing the applicability of the concept of collateral estoppel in the federal criminal law. See *Ashe* v. *Swenson*, 397 U.S. at 443. Actually *Oppenheimer* appears to be a res judicata case.

In *Sealfon* v. *United States*, 332 U.S. 575 (1948) it was held that, like res judicata, the doctrine of collateral estoppel also applies in criminal cases. Thus, where the defendant had been acquitted of conspiracy to defraud the United States by presenting false invoices, application of collateral estoppel principles precluded a second prosecution for the substantive offense of uttering the false invoices where a "practical" review of the evidence at the first trial suggested that the acquittal implied a lack of guilt on the substantive count as well. Again, there was no indication as to whether this result was required by the Constitution.

The answer to the latter question was supplied in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), when it was held that the concept of collateral estoppel in criminal cases was included within the ambit of the double jeopardy clause. "Not hesitat[ing]" to hold this "established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy", 397 U.S. at 445, the Court noted that at a minimum double jeopardy means that an acquitted defendant need not "run the gantlet" a second time. *Id.* at 446, quoting *Green* v. *United States*, 355 U.S. 184, 190.

B. The Principles Of Ashe Are Equally Applicable When The Government Seeks To Introduce Other Crimes Evidence Concerning Acquitted Conduct.

The factual paradigm presented in *Ashe* involved a reprosecution of the defendant for a second offense after he had previously been acquitted of another offense arising out of the same transaction. The issue presented in this case, which has divided the courts of appeal, and

which has not yet been addressed by this Court,[28] is whether the principles of *Ashe* apply when the Government seeks to introduce evidence of acquitted conduct at a subsequent trial involving an unrelated offense.[29]

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[28] This Court has considered the principles of *Ashe* and the significance of an acquittal to subsequent proceedings in several cases. Thus, collateral estoppel does not prohibit a defendant from being convicted of aiding and abetting even though the principal has been acquitted, *Standefer* v. *United States*, 447 U.S. 10 (1980); a plaintiff in a Section 1983 action based on alleged violation of the Fourth Amendment is collaterally estopped from relitigating the issue after it had been adversely decided against him in a state court criminal proceeding, *Allen* v. *McCurry*, 449 U.S. 90 (1980); and an acquittal does not collaterally estop the same issue from being litigated in a civil or forfeiture case, *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972); *United States* v. *One Assortment of Eighty-Nine Firearms*, 465 U.S. 354 (1984). The issues presented in each of these cases are easily distinguishable from that presented here and where relevant, the holdings are discussed below.

[29] The cases and legal literature often utilize the term "ultimate" fact when referring to the introduction of acquittal evidence that is a necessary element or factual predicate for the second prosecution and the term "evidentiary" fact when the prior acquitted evidence is not the *sine qua non* of the second prosecution but merely offered pursuant to an evidentiary rule, such as Federal Rule of Evidence 404(b). *Ashe* utilizes the terminology "issues of ultimate fact," 397 U.S. at 443, because that was the situation before the Court in that if Ashe's identity had been determined adversely to the state's contention in the first trial there could be no further prosecution. The question presented here is the "evidentiary" situation, since petitioner could still be prosecuted for the bank robbery regardless of whether the prior jury had determined that he had not been the person who had robbed Vena Henry. Petitioner's references to "evidence of acquitted conduct" herein refers to the latter evidentiary situations. See *United States* v. *Keller*, 624 F.2d 1154 (3d Cir. 1980); Comment *Expanding Double Jeopardy: Collateral Estoppel and Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted*, 2 Fla. St. L. Rev. 511, 19-20 (1974).

The vast majority of the circuit decisions considering this issue have recognized that some form of collateral estoppel is applicable to bar the introduction of evidence concerning unrelated crimes for which the defendant has been previously acquitted. However, the courts rejecting such evidence through application of collateral estoppel principles have not been in agreement concerning whether the result is required by the constitutional doctrine of *Ashe* or merely mandated by application of common law collateral estoppel principles. An analysis of the cases seems to reveal that most of the circuit courts of appeal considering this issue have held, as petitioner contends, that there is no doctrinal distinction between the use of such evidence in the *Ashe* scenario and the use of such evidence in a subsequent trial for unrelated criminal conduct.

Thus, decisions from the First, Second, Fifth, Eleventh, and District of Columbia Circuits have clearly held that double jeopardy principles of *Ashe* require the exclusion of acquitted conduct evidence in a subsequent prosecution unrelated to the factual scenario involved in the acquittal. *United States* v. *Gonzalez-Sanchez*, 825 F.2d 572 (1st Cir.), *cert. denied*, sub nom. *Latorie* v. *United States*, 108 S.Ct. 510 (1987); *United States* v. *Mespoulede*, 597 F.2d 329 (2nd Cir. 1979); *Wingate* v. *Wainwright*, 464 F.2d 209 (5th Cir. 1972); *Albert* v. *Montgomery*, 732 F.2d 865 (11th Cir. 1984); *United States* v. *Day*, 591 F.2d 861 (D.C. Cir. 1978).

The Third and Sixth Circuits seem to base their decision on common law collateral estoppel doctrine without reaching the constitutional issues. *United States* v. *Keller*, 624 F.2d 1154 (3d Cir. 1980);[30] *United States* v. *Johnson*,

[30] In *Keller* the Third Circuit specifically reserved the question as

697 F.2d 735 (6th Cir. 1983). These courts often apply collateral estoppel without discussion of the distinction between the constitutional and common law doctrine.

Post-*Ashe* decisions from the Ninth and Tenth Circuits allow such prior acquittal evidence where it otherwise meets the standards of Federal Rules of Evidence 404(b). *United States* v. *Rocha*, 553 F.2d 615 (9th Cir. 1977); *United States* v. *Van Cleave*, 599 F.2d 954 (10th Cir. 1979). The Eighth Circuit seems to hold that *Ashe* does not prohibit the subsequent evidentiary use of acquitted conduct. *United States* v. *Riley*, 684 F.2d 542 (1982), *cert. denied* 459 U.S. 1111 (1983).[31] The approach to this issue may even vary among different panels of the same circuit. For instance in *United States* v. *Gentile*, 816 F.2d 1157 (1987) the Seventh Circuit seems to be holding that the *Ashe* principles would not be applicable in the evidentiary use situations, while in *United States* v. *Castro*, 629 F.2d 456 (1980) the court without directly so holding seems to

to whether the constitutional principles of *Ashe* apply to the attempted evidentiary use of acquitted conduct in situations not involving reprosecution for the same transaction. *Id.* at 1159-1160. In the instant case the Third Circuit assumed that the statutory harmless error standard, rather than that required by *Chapman* v. *California*, *infra*, applied without resolving the question it had explicitly left open in *Keller*. The petitioner's petition for rehearing before the Third Circuit, seeking reconsideration in light of the unresolved question in *Keller*, was denied without opinion. (App. 50).

[31] While this seems to be the holding in *Riley*, in *King* v. *Brewer*, 577 F.2d 435 (1978) the Eighth Circuit, also, in a strained, *Ashe*-prohibited, "hypertechnical" analysis, seems to say that the issue that the defendant sought to bar there was not actually decided in the first trial, thus making collateral estoppel inapplicable. *Id.* at 440-1. In coming to its conclusion the court apparently confused the *Ashe*-analysis barring prosecution altogether with the mere evidentiary bar scenario.

assume the applicability of *Ashe* to the evidentiary use of acquitted conduct.[32]

While the overwhelming majority of cases hold collateral estoppel applicable to the evidentiary use of acquitted conduct, the distinction as to whether such evidence is barred by the double jeopardy-collateral estoppel principles announced in *Ashe* or the mere application of common-law doctrinal collateral estoppel principles may be important in two distinct areas. First, as presented in this case, a stricter harmless error inquiry will be necessitated if such evidence is in violation of the Fifth Amendment. See *United States* v. *Gonzalez-Sanchez*, *supra*. Secondly, if such errors are of constitutional magnitude, then a claim of the erroneous admission of acquittal conduct evidence raises an issue cognizable in federal habeas corpus proceedings. See *Albert* v. *Montgomery*, *supra*; *Wingate* v. *Wainwright*, *supra*.

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[32] An analysis of the approach taken in the circuits requires a close examination of the factual paradigm presented in each case. For the most part the cases cited involve issues relating to the evidentiary use of acquitted conduct in unrelated subsequent prosecutions. Some cases involve a middle ground between the *Ashe* situation where the subsequent prosecution is based on the same transaction and the unrelated subsequent prosecution case presented here. These cases usually involve situations where the defendant is charged with both compound and predicate offenses, such as conspiracy and substantive offenses occurring during the conspiracy and where a retrial is necessitated after the acquittal of one or the other. For instance see *United States* v. *Jackson*, 778 F.2d 933 (2nd Cir. 1985), *cert. denied*, 479 U.S. 910 (1986). While it is not necessary to decide the applicability of these principles in the compound-predicate offense cases, as the issue is not presently before the Court, the defendant would suggest that the same principle would apply. In fact, *Sealfon* v. *United States*, 332 U.S. 575 (1948), discussed above, dealt with the application of collateral estoppel in such circumstances.

Petitioner submits that the cases holding that the evidentiary use of acquitted conduct evidence may constitute a violation of the double jeopardy-collateral estoppel principles of the Fifth Amendment correctly reason that the rationale of *Ashe* applies with equal force in these situations.[33] In *Green* v. *United States*, 355 U.S. 184, 187 (1957), this Court held that one of the principal purposes of double jeopardy protection:

> . . . is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

See also *Arizona* v. *Washington*, 434 U.S. 497, 503-4 (1978). *Ashe* recognized similar concerns in the concluding paragraph when it is noted that double jeopardy does not allow the state to utilize an initial trial as a "dry run for a subsequent one."

Collateral estoppel doctrine, on the other hand, "has the dual purpose of protecting litigants from the burden of

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[33] Commentators have similarly agreed that there is no principled distinction supporting the argument that *Ashe* should not be extended to the evidentiary use of prior acquitted conduct in subsequent unrelated prosecutions. See Comment, *Other Crimes Evidence: Relevance Reexamined*, 16 J. Mar. L. Rev. 371, 388 (1983); Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L. J. 962, 976 (1980); Delao, *The Admissibility of Prior Acquitted Crimes Under Rule 404(b): Why The Majority Rule Should be the Majority Rule*, 16 Fla. St. U. L. Rev. (1989); Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 Iowa L. Rev. 281 (1980); but see Note, *Evidentiary use of Prior Acquitted Crimes: The Relative Burdens of Proof Rationale*, 64 Wash. L. Qrt. 981 (1986).

relitigating an identical issue with the same party or its privy and promoting judicial economy by preventing needless litigation." *Parklane Hosiery Company* v. *Shore*, 439 U.S. 322, 326 (1979). In addition, "by preventing inconsistent decisions, [collateral estoppel] encourage[s] reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980).

These principles are all applicable to the evidentiary use of acquitted conduct in a subsequent trial. The overwhelming advantage that the Government has in resources make it inequitable to require a defendant again to mount a defense to a charge for which he has been acquitted.[34] It is no answer that the defendant is not being tried for the acquitted offense but for an unrelated one. It will often be as important for the defendant to successfully defend against the inference sought to be drawn by the evidentiary use of the acquitted conduct as it was in the original trial. However, the defendant may lack the resources and ability to again defend.[35] A defendant thus acquitted would also still be subject to "embarrassment, expense and ordeal, and compell[ed] to live in a

[34] ". . . double jeopardy is not simply res judicata dressed in prison garb. It was called before more by oppression than by crowded calendars. It equalizes, in some measure, the adversary capabilities of grossly unequal litigants." Note, *Twice in Jeopardy*, 75 Yale L. J. 262, 277-8 (1965). In addition to the relatively unequal resources argument, other collateral estoppel concerns, such as the potential for harassment of litigants are magnified in the criminal area. Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harvard L. Rev. 1, 32 (1960).

[35] In fact, since there is no requirement that the Government reveal the general details of its case in pretrial discovery in the federal system a defendant may not even be aware that the government intends to introduce acquitted conduct evidence at a subsequent trial, thereby impeding his defense. See *United States* v. *Kendall*, 766 F.2d 1426 (10th Cir.) *cert. denied*, 474 U.S. 1081 (1986).

continuing state of anxiety and insecurity." *Green* v. *United States*, 355 U.S. at 187. Since statute of limitations principles presumably would not apply to the evidentiary use of prior acquitted conduct, theoretically a defendant would always face the prospect of having once again to defend at some unascertainable time in the future against an allegation of which he has been acquitted.[36]

Other specific benefits conferred by collateral estoppel are evident. Exclusion of prior acquittal evidence promotes judicial economy in that it prevents the relitigation of issues that have been previously decided. The dramatic increase in the judicial workload coupled with ever-increasing belt-tightening measures by legislatures support the logical extension of the principles of *Ashe* to the evidentiary use of acquitted conduct. Large expenditures of resources to retry issues will be avoided.

The cases holding the principles of *Ashe* applicable to the evidentiary use of acquitted conduct recognize that the burden placed upon the defendant is indistinguishable from that faced by Ashe. Perhaps the idea was best stated by the Fifth Circuit in *Wingate* v. *Wainwright*, 464 F.2d 209, 213 (1972):

> We do not perceive any meaningful difference in the quality of 'jeopardy'[37] to which a defendant is again

[36] For instance, see *State* v. *Wakefield*, 278 N.W.2d 307 (Minn. 1979) where in a prosecution for a sexual offense allegedly occurring in June of 1977, the state attempted to introduce evidence concerning a rape for which the defendant had been acquitted six years earlier.

[37] Though the language of the double jeopardy clause does not define what is meant by "jeopardy," the concept is an evolving one. See Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harvard L. Rev. 1, 7-8. This Court has recognized that jeopardy may attach even where the first trial is not completed.

> subjected when the state attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of the 'ultimate' fact or merely an 'evidentiary' fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend again against charges of factual allegations which he overcame in the earlier trial.[38]

Concisely stated, regardless whether the acquitted conduct evidence relates to a so-called "ultimate" fact or is merely "evidentiary," the simple fact remains that the defendant is being retried for the same conduct.[39]

Arizona v. *Washington*, 434 U.S. 497 (1978). Clearly, where, as here, the first trial was completed to verdict, the petitioner was placed in jeopardy more so than the defendant whose trial is aborted before the final verdict. It might be argued that the petitioner was not placed in jeopardy for the *Henry* offense in the instant trial, but as the cited part of the *Wingate* opinion indicates, clearly there was no difference in the quality of jeopardy as petitioner was in danger "of life or limb" within the meaning of the Fifth Amendment. The "life or limb" language of the Fifth Amendment also distinguishes the civil-forfeiture cases relied upon by the Government in its burden of proof argument, as there double jeopardy does not apply because the defendant is in no such danger.

[38] *People* v. *Acevedo*, 508 N.E.2d 665, 671 (N.Y. 1987). Similarly: "We perceive no meaningful difference in the unfairness to which a defendant is subjected when the state attempts to prove his guilt by relitigating a settled fact issue, once necessarily decided in its favor, whether it is a question of ultimate factor or evidentiary fact."

[39] The Restatement (Second) of Judgments, Section 27, Comment J. (1982) also rejects any purported distinction in the application of collateral estoppel principles based on a characterization of "ultimate" vs. "evidentiary" facts.

Finally, in addition to the applicable double jeopardy and collateral estoppel rationales, the petitioner would suggest that another well-recognized judicial doctrine counsels that prior acquitted other crimes evidence should not be admitted. While Federal Rule of Evidence 404(b) may have been intended to expand the admissibility of other crimes evidence, *Huddleston* v. *United States*, ___ U.S. ___, 108 S.Ct. 1496, 1499 (1988), the rule itself still reflects the long established common law principle that such evidence is not favored. See *Michelson* v. *United States*, 335 U.S. 469, 475-76 (1948). Petitioner suggests that the barriers to admission of this type of evidence should not be further removed by allowing the use of evidence of acquitted conduct. The dangers that such evidence may be wrongfully utilized by a jury to infer guilt from an alleged propensity towards criminal conduct may actually be greater when such acquittal conduct evidence is admitted. The defendant, as here, may well want to bring to the jury's attention the fact that he was acquitted.[40] In such circumstances the jury may well draw the inference that the defendant has "gotten a break" once and that it is unlikely that he would be wrongfully charged the second time. This type of reasoning, coupled with the dangerous tendency to infer propensity, may well cause the jury to give even more weight to the acquitted conduct evidence.

In this vein petitioner notes that this Court has tended to expand the protection afforded by collateral estoppel,

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[40] As with the decision whether to admit such evidence in the first instance, those jurisdictions allowing the admission of acquitted conduct are not in agreement as to whether the defendant is entitled to show that he was acquitted. See Annotation, *Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of That Offense*, 25 A.L.R. 934.

when consistent with the underlying philosophy of that doctrine and where necessary to accommodate the changing realities of litigation. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971); *Parklane Hosiery Company* v. *Shore*, 439 U.S. 322 (1979); *Montana* v. *United States*, 440 U.S. 147 (1979). The result in *Ashe* was to some extent dictated by modern changes in the criminal charging process "with the advent of specificity and draftmanship and extraordinary proliferation of overlapping and related statutory offenses" making a single alleged criminal transaction the possible subject of numerous prosecutions. 397 U.S. at 445, n. 10. Similarly, an expansion of *Ashe* to bar the evidentiary use of prior acquitted conduct would be responsive to doctrinal changes in the criminal law which have the potential to unfairly prejudice the defendant. This Court has noted that Rule 404(b) was intended to expand the grounds of admissibility of other crimes evidence. *Huddleston* v. *United States*, 108 S.Ct. at 1501.[41] With the expanded concept of the admissibility of other crimes evidence and the long recognized dangers inherent in such evidence, see IA Wigmore, *Evidence*, Section 58.2 (Tillers rev. 1983), application of the principles of *Ashe* to bar such evidence when there previously has been an acquittal is a needed response to the development in this area of the law and one which is consistent not only with the policies of collateral estoppel and double jeopardy, as discussed above, but also with the desirable goal of attempting to minimize the possibility that a jury will

[41] See also 2 Weinstein and Berger, *Evidence*, Section 404[08], p. 404-54. While Rule 404(b) adopts the so-called "inclusionary" rule, most jurisdictions follow the "exclusionary rule," which presumes that such other crimes evidence is not to be admitted, though in practice the results are often similar.

decide a defendant's guilt on the basis of extraneous and prejudicial other crimes evidence.

The Government's main argument against the applicability of *Ashe* to the evidentiary use of prior acquittal evidence seems to be a burden-of-proof analysis. Thus, the Government argues that inasmuch as an acquittal only establishes a reasonable doubt of the defendant's guilt and since under *Huddleston* v. *United States*, *supra*, proof beyond a reasonable doubt of conditional facts establishing relevance is not required, the acquittal should not operate as a bar to admissibility. Response of Government to Petition for Writ of Certiorari, p. 8-10. In support of this argument the Government cites this Court's opinions in *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1975), and *United States* v. *One Assortment of Eighty-Nine Firearms*, 465 U.S. 354, 359-62 (1984). In each of these cases the Court held that defendant's acquittal did not bar a subsequent related forfeiture or civil penalty action based on the same conduct.

The Government's reliance on this line of cases is inapposite for several reasons. First, there is a clear difference in the attempted use of acquitted conduct evidence in a subsequent forfeiture or other civil action and the reliance on such evidence in a criminal case. This Court has often recognized the overarching interest of a defendant in a criminal case. See *In re Winship*, 397 U.S. 358, 363-4 (1970). Further, as noted in *One Lot Emerald*, the provisions of double jeopardy are inapplicable because the forfeiture "involves neither two criminal trials nor two criminal punishments." 409 U.S. at 234; *Eighty-Nine Firearms*, 465 U.S. at 364. See footnote 37, *supra*. Clearly, the use of acquitted conduct evidence in the subsequent criminal prosecution cases is distinguishable

from its use in the civil penalty and forfeiture cases relied upon by the Government. That such a "hypertechnical" approach counters the policies behind *Ashe* is evidenced by the numerous courts of appeals cases cited above holding this type of evidence inadmissible.[42]

> As stated in *United States* v. *Mespoulede:*
>
> This is not a situation in which the second suit is civil in nature, where the defendant faces sanctions or penalties of quite a different order than those he escaped through acquittal on criminal charges.
>
> 597 F.2d at 335.

In addition, *Ashe* itself seems to reject the attempted jettisoning of collateral estoppel principles by invocation of a burden of proof argument:

> As a rule of federal law, therefore, "it is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the government had not met the higher burden of proof exacted in such cases for the government's evidence as a whole although not necessarily as to every link in the chain." *United States* v. *Kramer,* (cite omitted).

397 U.S. at 443

Finally, the Government's interpretation would unfairly deprive many defendants of the benefits sought to be protected by double jeopardy and collateral estoppel. The fact that an acquittal may be returned if there is a

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[42] This argument applies equally to the cases excluding such evidence on constitutional grounds and those relying on non-constitutional collateral estoppel. The evidence would not be precluded by either doctrine if the government's burden of proof argument was accepted.

reasonable doubt does not signify that all such verdicts reflect the jury's belief that the charges simply were not "proven." It is not unreasonable to interpret an acquittal as reflecting a finding of innocence by the jury. Comment, *Other Crimes Evidence: Relevance Reexamined,* 16 J. Mar. L. Rev. 371, 388 (1983). Certainly it can't be argued that all defendants are actually guilty and that acquittals only reflect a lack of proof. Clearly there is a large class of acquitted defendants who are indeed innocent and are believed so by the jury. These defendants will be unfairly penalized by such a "hypertechnical" approach as they may be required to later again defend against the same allegations despite their innocence and thus unfairly run the increased risk that they may be convicted in part because of erroneous inferences drawn from conduct of which they are innocent and have been so declared.

C. Applications Of These Principles To Facts Of This Case.

As discussed in petitioner's due process argument above, the attempt to reconstruct the basis of the jury's acquittal can be a difficult process. Collateral estoppel simply means that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit of a different cause of action involving a party to the first case." *Allen* v. *McCurry,* 449 U.S. 90, 94 (1980). *Ashe,* recognizing an overly technical approach to the analysis would have the effect of eviscerating the doctrine of collateral estoppel, observed:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires the court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters and conclude whether a rational jury could have

> grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' Mayers and Yarbrough, *Bis Vexari: New Trial and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39.

Reconstruction of the basis of the *Henry* acquittal is difficult in light of the fact that the transcript, pleadings, and instructions in the *Henry* case were not filed in the instant case. After defense counsel argued that the *Henry* evidence should be excluded because of the acquittal, "on that basis alone," the trial judge, in a conclusory and an unexplained manner, commented that he did not "believe" that petitioner had been acquitted on the issue of identification." (App. 21). The prosecutor then responded that the co-defendant in the *Henry* case, Mr. Christian, had defended on the basis that he had "merely came to retrieve from an individual in the house money from an the individual in the house." [sic]. (App. 21).[43] The court then remarked:

> Mr. Dowling's presence in the house was not seriously contested in the case but he stated the *general defense*. Mr. Dowling, I don't think, took the stand." (App. 21). [Emphasis added].

In its response to the petition for writ of certiorari the Government contended that the Third Circuit erroneously placed the burden of proof on the Government to show that the issue upon which it sought admission of the *Henry* evidence was not expressly decided by the acquittal. Government's Response to Petition for Writ of Certiorari, p. 5, n. 1. Without expressly so holding, it

[43] The prosecutor admitted that he was not present at the trial of the *Henry* robbery. (App. 21).

does appear that the Third Circuit viewed the burden to be on the Government on this issue. (App. 43-44).

Petitioner submits that the burden indeed should be placed on the Government to show that the issue upon which it seeks to admit prior acquittal evidence under Rule 404(b) was not necessarily determined in the prior trial. This result follows from accepted burden of proof rules concerning the admission of other crimes evidence as well as this Court's decision in *Huddleston* v. *United States*, 108 S.Ct. 1496 (1988). The proponent of Rule 404(b) evidence has the burden of establishing such evidence is relevant to the issues under consideration. *United States* v. *Biswell*, 700 F.2d 1310, 1317 (10th Cir. 1983); *United States* v. *Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982). While holding that a court need not make a preliminary finding under Federal Rule of Evidence 104(a) that the Government has proved the other crime by a preponderance of the evidence, *Huddleston* did recognize that "evidence is admissible under Rule 404(b) only if it is relevant," *Id.* at 1501, and that the proponent does bear the burden under Rule 104(b) of establishing the conditional relevance by a preponderance of the evidence. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter *properly probable* in the case." Advisory Committee Notes on Federal Rule of Evidence 401, 28 U.S. App., p. 688. [Emphasis added]. Where the issue upon which the Government seeks to admit Rule 404(b) evidence has been previously decided, and its admission would violate the defendant's protection against double jeopardy, then the matter is not relevant in the sense of being "properly provable." It therefore logically follows that when attempting to present prior acquittal evidence under Rule 404(b), the Government, as

the proponent of the evidence, should bear the burden of establishing relevance and that the matter is "properly provable" in the sense that the acquittal does not operate as a collateral estoppel bar. Thus, *Huddleston*, when applied to the acquitted conduct situation, is consistent with the general rule that the proponent of such evidence bears the burden of establishing admissibility.

Another argument supports placing the burden of proof on the Government on this issue. Even if the Government's argument is correct that defendant should have the burden of showing that the issue upon which he seeks to foreclose evidence was necessarily decided in his favor in cases arising under the *Ashe* factual scenario, i.e. the "ultimate facts" case, such a result does not follow in this case. In *Ashe* situations the defendant is seeking to completely bar the second prosecution. Traditionally, a defendant who seeks to dismiss an indictment or otherwise foreclose a prosecution has the burden of proving the grounds upon which he seeks such relief. *United States* v. *Liotard*, 817 F.2d 1074 (3d Cir. 1987) (double jeopardy); *United States* v. *L'Allier*, 838 F.2d 234 (7th Cir. 1988) (speedy trial); *United States* v. *Giorgi*, 840 F.2d 1022 (1st Cir. 1988) (prosecutorial misconduct). However, in the admission of prior acquittal evidence in a subsequent unrelated trial, the defendant does not seek the more drastic remedy of terminating the prosecution but merely seeks to exclude the acquitted conduct evidence.

Here, the Third Circuit correctly held that the Government had not carried its burden on this issue. The fact that a co-defendant in the *Henry* case perhaps put forth a different defense[44] does not mean that the jury had deter-

[44] In fact, there is nothing in that record to indicate the precise testimony of petitioner's co-defendant, Delroy Christian, in the

mined the issue of petitioner's identity adversely to his contentions.

There is nothing further in the record to support the Government's contention that the jury in the *Henry* case had not decided the defendant's identity adversely to the Government. While stating that identity was not "seriously contested," the district court further noted that the defendant had stated the "general defense" and had not testified. (App. 21). However in the instant case the defendant did testify and denied that he was at Vena Henry's house at the time of the alleged robbery. (Supp. App. 1-5). Had the defendant actually admitted in his defense at the *Henry* trial that he had been at the Henry's residence, then it would be expected that the Government would have impeached his specific denial when he testified at this trial.[45] Further, there was evidence adduced in this case that petitioner had denied his involvement in the *Henry* case when first arrested in connection with that matter and *that denial had been introduced in evidence at the Henry trial*. (Tr. 9-23&24:60-1).

Finally, the Government's purported explanation that the first jury may have decided that petitioner was not

Henry trial. The Assistant United States Attorney stated that Christian had put forth a defense that the Henry incident was not really a robbery but was only an attempt "to retrieve from an individual in the house money . . ." (App. 21). There is no indication that Delroy Christian introduced any evidence or contended that petitioner was with him at the time. Even if the petitioner's co-defendant had so contended it is not clear how or why this would bar petitioner.

[45] Even though the defendant had not testified in the *Henry* trial, if his attorney, through witnesses or in argument, had admitted the petitioner's presence at the Henry house, then petitioner could have been cross-examined concerning this in the instant trial. See Federal Rule of Evidence 801(d)(2)(D). *United States* v. *McKeon*, 738 F.2d 26, 30 (2nd Cir. 1984).

guilty of the Henry robbery because it was in fact not a robbery but merely an attempt to collect money by using a mask and a gun is at a minimum counter to a common-sense interpretation and violates *Ashe's* injunction that a court must look at such issues "with realism and rationality," 397 U.S. at 444. Not only contrary to common-sense, such a purported explanation in all likelihood would be inconsistent with the requirement that a court, in examining such issues, look to the instructions given to the acquitting jury. *Sealfon* v. *United States*, 332 U.S. at 579. While the instructions in the *Henry* case are not part of this record, it is suggested that the jury in all likelihood was not instructed that it would be a defense to robbery to claim that the alleged robber merely approached an individual with a mask and gun in an effort to "retrieve" money, after breaking into the person's house. Such a strained interpretation violates *Sealfon's* admonition that the "instructions under which the verdict was rendered, however, must be set in a practical frame . . ." 332 U.S. at 579.

Petitioner respectfully submits that the Government, as proponent of the acquitted conduct evidence under Rule 404(b), did not bear the burden of establishing that such matter was relevant and "properly provable" and that the government's purported, non-evidenced explanations of the basis of the *Henry* verdict constitute precisely the "hypertechnical analysis" condemned in *Ashe*.

III. THE ADMISSION OF THE VENA HENRY EVIDENCE WAS NOT HARMLESS.

If the Vena Henry evidence was wrongfully admitted under the due process or double jeopardy clauses of the Fifth Amendment, then, contrary to the harmless error analysis applied by the Third Circuit, petitioner is entitled to have the affect of that error reviewed under the

standards of *Chapman* v. *California*, 386 U.S. 18 (1967). Thus, the "beneficiary of a constitutional error," here the Government, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.

There appears to be conflicting authority and views as to whether this Court should itself undertake a review of the record to determine the issue of harmless error. See *United States* v. *Lane*, 474 U.S. 438 (1986). While this Court certainly has the power to conduct the harmless error evaluation, it appears that it exercises this power "sparingly." *United States* v. *Hasting*, 461 U.S. 499, 510 (1983). Petitioner submits that a remand for a harmless error analysis under *Chapman* is more appropriate. In the event the Government in its brief attempts to reach the merits of whether the admission of the Vena Henry evidence actually constituted harmless error within the meaning of *Chapman*, petitioner will more specifically address this issue in a reply brief.[46]

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[46] In the petition to rehear and suggestion for a rehearing en banc in the Third Circuit, petitioner contended that the court had not only utilized the wrong standard in evaluating the effect of the error, but in addition had improperly applied the standard it did utilize. The Third Circuit's analysis appeared to be more of a sufficiency-of-the-evidence inquiry, which is distinct from harmless error analysis. See *United States* v. *Lane*, *supra*; *Kotteakos* v. *United States*, 328 U.S. 750 (1946). *Kotteakos* requires an "examination of the proceedings in their entirety." 328 U.S. at 762. The Third Circuit cited the evidence supporting a verdict of guilty, but failed to give proper weight, and at times even mention, evidence indicating that each of the eyewitnesses had failed on one or more occasions to identify the defendant in pretrial identification procedures, the weak and indeed perhaps even collusive explanations for those failures, the limited time and stress under which the obeervations were made, etc. In addition, the Third Circuit cited circumstantial evidence tending to support the hypoth-

CONCLUSION

The petitioner submits that his Fifth Amendment rights to due process of law and protection against double jeopardy were violated by the admission of the testimony of Vena Henry. Accordingly, this case should be remanded to the United States Court of Appeals for the Third Circuit to determine whether the admission of such error was harmless beyond a reasonable doubt within the meaning of *Chapman* v. *California*, 386 U.S. 18 (1967).

Respectfully submitted,

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esis of guilt, but failed to adequately address how portions of this evidence, which could only logically be connected by the Henry testimony, must be discounted in light of the exclusion of the Henry evidence. See generally (App. 45-9).

APPENDIX

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EXCERPTS FROM TRIAL TESTIMONY OF PETITIONER REUBEN DOWLING 2a

Excerpts From Trial Testimony Of Petitioner Reuben Dowling

[11] him.

Q. Do you—what do you know about a woman by the name of Vena Henry. Have you heard of that name before?

A. Yes, I know Miss Vena Henry.

Q. How do you know her?

A. I had a case here, you know, and my attorney had testified yesterday, John Chamble, you know he told me that that woman, Vena Henry claim that she took a mask off me, you know. So, I told him, I say, hey, like, I asked the police if she have a mask that she took off me, ask the police if they have hair in the mask, and I told him I would volunteer to give my hair if they find hair in the mask, and police came and took me to a doctor, and the —

ATTORNEY MARSHACK: Objection.

THE COURT: Sustained.

Q. Mr. Dowling, did there ever come a time when you were in court involving an incident with Vena Henry?

A. Yes, I was in court [12] involving an incident, and the jury found me not guilty, I didn't even testify, you know.

Q. Was there any other time in 1979 when you were in court?

A. Yes, I was.

Q. What was that incident?

A. In 1979, I was 21 years old, and me and my brother and my friend was convicted for bank robbery, and Judge Christian give us 15 years.

ATTORNEY MARSHACK: Objection.

THE COURT: Sustained.

ATTORNEY MOSS: No further questions at this time, Your Honor.

THE COURT: Your witness. While counsel is coming forward, I want to bring to the jury's attention that Mr. Dowling has brought out the fact that in 1979 he was convicted of the felony of bank robbery. That is allowed to be brought out if Mr. Dowling chose to testify, it is allowed to be brought out.

Not to suggest that he was [13] involved in the matter at present, but rather it is allowed to be used. Felony conviction is allowed to be used for purposes of impeachment. You may keep that in your mind if you choose to, having to do with credibility and believability as I will talk about in the case.

CROSS EXAMINATION BY ATTORNEY MARSHACK:

Q. Good afternoon, Mr. Dowling?

A. Good afternoon, sir.

Q. Do you recall being in Ms. Vena Henry's House on July 20, 1985?

A. No, sir.

Q. Isn't it a fact that you — you discussed with us that you came into court and Ms. Henry came in and talked in the courtroom; isn't that correct, that you came on trial here in 1985 having to do with Ms. Henry, and you came to court, and she [14] testified against you, is that correct?

A. Correct.

Q. And you had a codefendant in that case?

A. Yes.

Q. What was that codefendant's name?

A. Delroy Christian.

Q. Now, isn't it true that Mr. Zurita arrested you in connection with that crime that you were charged with at 99 Strawberry?

A. Zurita always arrest me.

Q. And isn't it true that you made two statements to Detective Zurita with respect to that incident?

A. I never made no statement to Zurita, never.

Q. Isn't it a fact that you told Zurita with respect to the incident at 99 Strawberry to check the guy out, there wasn't no robbery?

A. I never tell Zurita that.

[15] Q. When you were arrested in connection with that incident at 99 Strawberry, didn't you tell Officer Zurita that the only thing he can convict you of is bank robbery and you were wearing a mask and gloves?

A. Zurita make up that.

ATTORNEY MARSHACK: May I have a moment? I have nothing further, Your Honor.

THE COURT: You have anything further Miss Moss?

ATTORNEY MOSS: Yes.

REDIRECT EXAMINATION: BY ATTORNEY MOSS:

Q. Mr. Dowling, when you were arrested by officer Zurita, on July 22, 1985, do you recall seeing an Advice of Rights form?

A. Yes, ma'am.

Q. Can you explain to the jury what that form said?

A. Well, Zurita did bring me a